The Public/Private Divide and European Private Law

Cherednychenko, O.O.

The Public/Private Divide and European Private Law

Inaugural lecture, delivered by

Prof. dr. Olha O. Cherednychenko

university of groningen / faculty of law

Prof. dr. Olha O. Cherednychenko
is a Professor at the University of Groningen where she holds a Chair in European Private Law and Comparative Law. She is also the founding director of the Groningen Centre for European Financial Services Law (GCEFSL). Her research focuses on the role of private law in the process of European market integration and the interaction between national and supranational legal orders and public and private governance mechanisms more generally.

Prior to her appointment in Groningen in 2012 (initially as an Associate Professor and since 2019 as a Full Professor), Olha Cherednychenko held positions as a Lecturer/Researcher at the University of Utrecht (2002-2006) and as a Senior Lecturer at the VU University Amsterdam (2006-2012). She has also been a Visiting Fellow/Professor at the European University Institute (EUI), Florence; the Institute of European and Comparative Law (IECL), University of Oxford; the London School of Economics and Political Science (LSE); the Institute of Advanced Legal Studies (IALS), University of London; and the University of Turin. As a project leader and/or senior researcher, she has been involved in multiple European research projects, in particular for the European Parliament and the European Commission.

Olha Cherednychenko holds an LL. M. in International and European Law (*magna cum laude*) and a Ph. D. in Law from the University of Utrecht. Her doctoral thesis *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (Munich: Sellier European Law Publishers, 2007) received honourable recognition from the Dutch Commission for the Evaluation of Legal Research 2009.

The Public/Private Divide and European Private Law

Olha O. Cherednychenko

Inaugural lecture
Delivered at the University of Groningen on Tuesday, 10 December 2019[*]

[*] This inaugural lecture builds on O.O. Cherednychenko, 'Rediscovering the Public/Private Divide', (2020) *European Law Journal* 26 , forthcoming. The article is available here.

Esteemed Rector Magnificus, Members of the Board of the University,
Dear Colleagues and Students, Family and Friends,
Ladies and Gentlemen

I. Prologue

In this lecture, I would like to revisit the controversy surrounding one of the oldest divisions common to European legal culture – the division of the law into public and private. I will do so within the particular context of the law of the European Union (commonly referred to as EU law). But let me first introduce you to a fictious person – let us call him Martin – who will help us explore the meaning of these abstract legal categories and their role in shaping our lives today. Martin is a 25 years old EU citizen and a graduate of the University of Groningen who has just started his first job. Like many other young people, he wants to make the most out of life but is also concerned about the state of our planet.

What Martin needs to be able to lead a meaningful life is the law, in particular public and private law. The conceptual distinction between public and private law has primarily evolved in continental legal systems, such as the Netherlands. It is not unknown, however, to common law systems, such as England and Wales, either. In both legal traditions, public law generally focuses on the relationship between *public authorities* and citizens or between public authorities themselves. It also equips public authorities (including private organisations acting in this capacity) with the powers and enforcement instruments necessary to act in the *public* interest. As a citizen, Martin has fundamental rights against his State under constitutional law, such as the right to life, liberty and privacy. These rights not only prohibit public authorities, for instance, from taping Martin's telephone conversations without an appropriate justification. They also oblige such authorities to take a positive action to protect the environment in which he lives. In the pursuit of this important public interest, the State may adopt administrative regulations cutting the maximum speed limit on its roads to just 100km/h. And if Martin does not slow down, he may get a hefty fine under administrative law.

In contrast, national private law has been traditionally conceived of as that part of law which secures a sphere of positive freedom and interpersonal justice for individuals like Martin. It constructs a legal framework which allows *private persons* to shape their relationships with each other and which primarily seeks to ensure the balance between the *private* interests of these persons through their respective rights and obligations. Within such a framework, for example, Martin does not have to buy an expensive Tesla to address environmental concerns of the society as a whole. He may simply buy any car he likes and opt for a much cheaper Volkswagen. If the seller then refuses to deliver the car due under the sales contract, as a buyer, Martin has a right as against that seller to claim performance and/or damages under contract law. But if he then accidentally drives the newly bought Volkswagen into his neighbour's front

door, the neighbour is entitled to compensation for this wrongful injury under tort law. In case the breaching party does not perform the contract or pay damages, the innocent party will typically have to take action before a court.

Over the last couple of decades, the public/private divide along these lines has been challenged on multiple grounds and has probably been most debated in the context of EU law. The thing is that EU law does not recognize the distinction between public and private law as it had evolved within the national legal systems of its Member States. However, I will argue today that the conceptual distinction between these well-established categories does matter not only in national law but also in EU law and that it may profoundly affect the legal position of people like Martin. This argument will be developed in three consecutive steps. First of all, I will explore the character of EU *private* law and explain how this fast-developing legal field challenges the traditional public/private divide (Part II). I will then show that this distinction is nevertheless not entirely foreign to EU private law (Part III). Finally, I will draw out the implications of my findings for policy-making and legal scholarship (Part IV).

II. The Character of EU Private Law and the Blurring Line between Public and Private Law

In a broad sense, EU private law can be understood as that part of EU law which shapes the relationships between *private* parties. The emergence of EU private law is inextricably linked to the idea of creating the internal market, which is central to the EU. Within the EU internal market, goods, services, capital and labour are to move freely between – at least for now – 28 Member States. By allowing greater competition and boosting trade between Member States, such a vast market is supposed to enhance the prosperity and well-being of EU citizens like Martin. To realise the internal market, the EU has not only sought to dismantle national barriers to free movement, such as import tariffs (a process known as 'negative integration'), but also to introduce common European rules under which the market operates (a process known as 'positive integration'). The bulk of such rules in the field of EU private law has developed after the adoption of the Single European Act 1986. In particular, the Act recognized the need for a high level of consumer protection in the internal market, paving the way for the EU harmonisation of national laws in many areas, such as non-discrimination, product safety, sales of goods, energy, telecommunications, financial services, to name but a few.

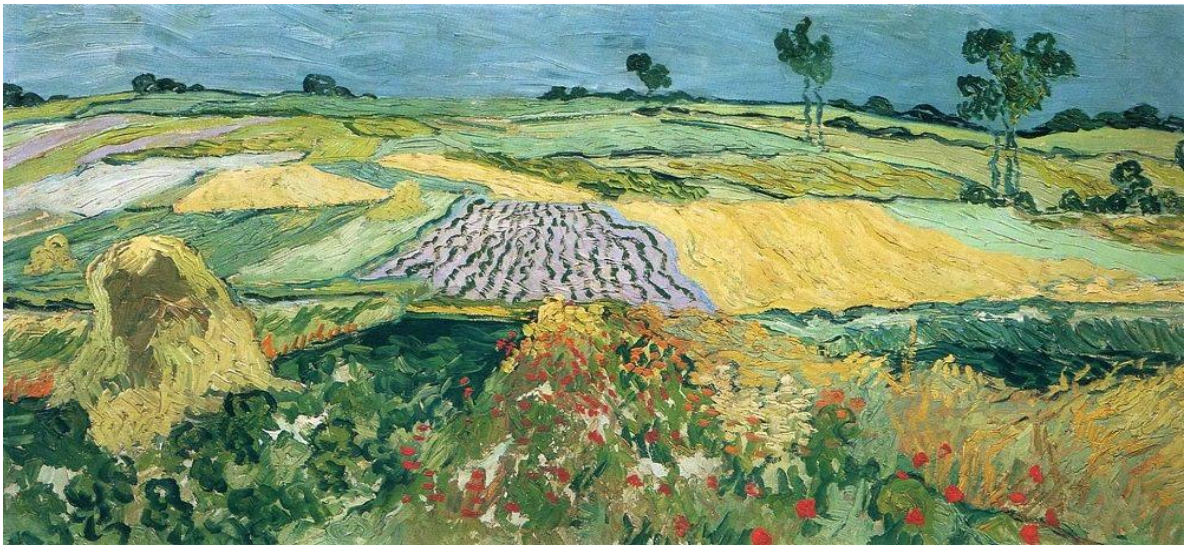
Today EU private law is thus only in its thirties, quite young compared to the centuries-old national private law. And yet it profoundly challenges the public/private divide and, in particular, the notion of private law as it had developed in the nation-state context. Unlike national private law, EU private law is not primarily concerned with people and their private interests as ends in themselves. Rather, it tends to view private persons as a means to the creation of the internal market. The ultimate goal is to enable and encourage our Martin to reap its benefits. In his capacity as a consumer, for instance, Martin is expected to shop cross-border and buy not only goods, such as cars, but also services, such as credit, in Member States other than his own. Insofar as justice considerations influence EU private law, they are mainly concerned with what Hans Micklitz has called 'access justice' beyond the nation-state.[1] Access justice enables EU citizens to participate in the internal market but, as such, cannot be equated with interpersonal justice pursued by national private law.

To foster cross-border trade, the EU legislator has been harmonising national laws in a piecemeal fashion. For these purposes, it has been using and experimenting with private law concepts, notably from the fields of contract and tort law, as tools of market integration. The private law concepts in turn have often been combined with the public law concepts, especially from the fields of constitutional and administrative law. In so doing, the EU legislator does not, at least not explicitly, prescribe in which body of law Member States should transpose a particular EU directive.

The resulting body of EU private law rules looks like a patchwork quilt from Vincent van Gogh's paintings, including elements of both public and private

[1] H.-W. Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge University Press, 2018) 2 *et seq*.

law. It is regulatory and functional in nature; a kind of 'techno-law', as Hugh Collins put it.[2] EU private law does not substitute national private law as the basis of private law relationships but rather relies on it for the realisation of its policy goals. At the same time, by virtue of its very nature, EU private law prompts or fosters the development of legal hybrids, both at the EU and national level.



Vincent van Gogh – *Wheat Fields at Auvers under Clouded Sky 1890*

One of such hybrids is the 'constitutionalised private law'.[3] It stems from the fact that all EU harmonisation measures, including those in the field of private law, must comply with fundamental rights, notably the EU Charter of Fundamental Rights. The Charter brings non-market considerations into the market-biased EU private law. The private law relationships within the scope of EU law, such as the one between Martin and Facebook, for example, are therefore not immune from the impact of fundamental rights. After all, when regulating BigTech companies, including Facebook, the EU legislator must ensure that such companies respect their users' fundamental rights to privacy and protection of personal data.[4] Facebook is not a State. But when using Martin's data for targeted adverts, it poses a threat to his privacy and protection of personal data on the same scale as the State does when taping his telephone conversations. Ironically, Facebook CEO Mark Zuckenberg has

[2] H. Collins, 'The Revolutionary Trajectory of EU Contract Law Towards Post-national Law', in S. Worthington *et al*. (eds), *Revolution and Evolution in Private Law* (Hart Publishing, 2018) 315, at 317.
[3] H.-W. Micklitz, 'Rethinking the Public/Private Divide', in M. Maduro *et al*. (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press, 2014) 271. On this phenomenon, see, e.g., O.O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (Sellier European Law Publishers, 2007).
[4] EU Charter of Fundamental Rights, arts 7 and 8, respectively.

even admitted himself that his social media giant is 'more like a government than a traditional company.'[5]

Another example of a legal hybrid is what I called 'supervision private law'.[6] This oxymoron reflects the rise of supervision by European and national administrative agencies over private law relationships in complex markets with information asymmetry between market participants. Financial markets are a case in point. Martin increasingly depends on financial markets – and private law that constitutes them – to be able to meet his essential needs. To buy a house and make it eco-friendlier, for instance, he would typically need to conclude a mortgage contract. However, as the latest global financial crisis has shown, financial markets across the EU have not always worked well for European consumers like Martin. In the Netherlands, for instance, since 1993 consumers have been sold around 7 million of so-called investment insurance policies, better known as *woekerpolissen* (or exorbitant policies), worth around EUR 100 billon.[7] At the point of sale, financial firms typically promised consumers high investment returns, high enough to pay off their mortgage. But in reality, these returns were never realised, as consumers ended up paying between EUR 20 and EUR 30 billion on commissions and other costs to financial firms.[8] For ordinary people like Martin, it was virtually impossible to fully comprehend the toxic nature of the *woekerpolis* at the time of purchase. Therefore, to ensure consumer protection against such products and the well-functioning of financial markets more generally, financial watchdogs – such as the Dutch *Autoriteit Financiële Markten* (*AFM*) and the European Securities and Markets Authority (ESMA) – are increasingly 'managing' private law relationships throughout the financial product life-cycle and in the distribution process.

This analysis reveals an increasing entanglement of the public and private spheres and enforcement modes in the process of the Europeanisation of private law. But does such entanglement imply that the orthodox distinction between public and private law has not played any role whatsoever in the making of EU private law? Or does it mean that this distinction has become wholly obsolete in the context of a post-nation state European private law laboratory? These are the questions to which I will now turn.

---

[5] See, e.g., H. Farrell *et al*., 'Mark Zuckenberg Runs a Nation State, and He's the King', *Vox*, 10 April 2018; <https://www.vox.com/the-big-idea/2018/4/9/17214752/zuckerberg-facebook-power-regulation-data-privacy-control-political-theory-data-breach-king>.

[6] O.O. Cherednychenko, 'Public Supervision over Private Relationships: Towards European Supervision Private Law?' (2014) 22 *European Review of Private Law* 37.

[7] Consumentenbond, 'Wat is een woekerpolis?', 21 September 2018; <https://www.consumentenbond.nl/acties/woekerpolissen/wat-is-een-woekerpolis>.

[8] *Ibid*.

III. Rediscovering the Public/Private Divide in EU Private Law

The point that I would like to make is this. Although EU private law does not recognize and even profoundly challenges the conventional distinction between public and private law, it nevertheless displays some of the signs of this distinction. When pursuing similar policy goals, some EU measures are clearly more oriented towards public law, whereas others have been written from a more private law perspective. Most importantly, the legal grammar in this sense does matter in practice for people like Martin in terms of their rights and remedies in case of breach of EU law. To illustrate the contrast I seek to draw between public and private law within EU private law, I will provide three sets of examples.

Unfair Contract Terms Directive vs. Unfair Commercial Practices Directive

Let me start by juxtaposing two major EU horizontal measures with relevance to contract and tort law – the Unfair Contract Terms Directive[9] and the Unfair Commercial Practice Directive.[10]

To purchase a product or a service he likes, Martin must typically agree with the general terms and conditions pre-formulated by the trader. Such standard terms are often contained in small print documents that hardly anyone reads. (I wonder if there are any lawyers in this room today who actually read them when creating his or her personal Facebook, Twitter or LinkedIn account.) This makes consumers vulnerable to the abuse of power by traders who may, for example, exclude Martin's right to compensation if the trader does not deliver the Volkswagen car. To address this problem, the EU has adopted the Unfair Contract Terms Directive. Even though this EU measure fits into the general objective of completing the EU internal market, it is also clearly concerned with justice between the consumer and the trader, in line with the traditional private law approach. In particular, the directive does not allow that the standard contract terms create an imbalance between the consumer's and trader's rights and obligations. Member States are obliged to have administrative agencies in place to prevent the use of unfair contract terms. At the same time, the directive explicitly confers an *individual right* on consumers under EU law not to be bound by such terms. Moreover, to ensure that consumers also have *an effective remedy* under the directive, the Court of Justice of the EU has strengthened their procedural position in disputes with traders. The obligation of the national courts to assess the fairness of contract

[9] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJEC* 1993 L 95/29.
[10] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, *OJEU* 2005 L149/22.

terms on their own motion[11] – when a consumer does not raise this issue at all – is just one example of the Court's judicial activism in this context.

The distinctly 'private law' grammar of the Unfair Contract Terms Directive becomes especially clear when we compare it with the Unfair Commercial Practices Directive. This more 'public law'-oriented EU measure forbids misleading or aggressive business-to-consumer marketing practices that could harm consumers' economic interests. Take the example of the recent 'Dieselgate' scandal over Volkswagen falsifying emissions data. Such a practice can be considered misleading under the Unfair Commercial Practices Directive. For it may have induced our environmentally-minded Martin into buying his Volkswagen car. And yet, the directive confers no individual rights on consumers who have become victims of unfair conduct. This means that Martin has no remedy under EU law to get out of the contract with the car seller. Nor is he entitled under EU law to sue the car manufacturer Volkswagen, which had installed the emissions-test-cheating device in his car, for damages in tort. Instead, the directive provides for *public* and *collective* enforcement of its provisions through inunctions and fines to prevent and deter unfair commercial practices. As a result, the ability of the victims of such practices to obtain adequate redress largely depends on national private law. However, national contract and tort law does not always enable such redress.[12] Interestingly, the European Commission's recent legislative initiative, called somewhat ambitiously 'New Deal for Consumers',[13] seeks to harmonise contractual and non-contractual remedies for breach of the Unfair Commercial Practice Directive. In my view, this is the acknowledgment of the major limitations of its 'public law' grammar in protecting consumers.

Product Liability Directive vs. Environmental Liability Directive

A further, even more striking, contrast between the two types of legal grammar within EU private law emerges when we consider the second set of examples – the Product Liability Directive,[14] as opposed to the Environmental Liability Directive.[15] Both measures use tort law as an instrument of market integration, but in a very different way. The adoption of the Product Liability Directive was prompted by the thalidomide tragedy in the 1960s. Thalidomide, a drug which

---

[11] See, e.g., Case C-243/08, *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi* [2009] ECLI:EU:C:2009:350; Case C-137/08, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider* [2010] ECLI:EU:C:2010:659; Case C-76/10, *Pohotovosť s. r. o. v Iveta Korčkovská* [2010] ECLI:EU:C:2010:685; Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECLI:EU:C:2012:242; Case C-472/11, *Banif Plus Bank Zrt v Csaba Csipai, Viktória Csipai* [2013] ECLI:EU:C:2013:88.

[12] European Commission, Report on the Fitness Check of EU consumer and marketing law, SWD(2017) 208 final, at 77 *et seq*.

[13] European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee 'A New Deal for Consumers'*, COM(2018) 183 final.

[14] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *OJEC* 1985 L 210/29.

[15] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, *OJEU* 2004 L 143/56.

was marketed as a mild sleeping pill safe even for pregnant women, caused thousands of babies worldwide to be born with malformed limbs. The directive lays down rules on the producers' liability for defective products, such as Thalidomide. The 'private law' grammar of the Product Liability Directive becomes apparent from the directive's basic scheme which is clearly concerned with ensuring *the balance between injured persons' and producers' interests* and with *individual consumer redress*. It imposes liability without fault, or strict liability, on producers for damage caused by a defect in their products. Compensation can be claimed for death or personal injury as well as the destruction of any item of property other than the defective product itself. To enable consumers like Martin to make use of this European remedy, the Court of Justice of the EU has repeatedly found national rules that facilitate consumers in proving a causal link between the product defect and the damage compatible with the directive.[16]

At first sight, the Environmental Liability Directive looks quite similar. This directive establishes a framework for environmental liability, based on the 'polluter pays' principle, using characteristic private law concepts. In particular, operators of dangerous activities can be held strictly liable under the directive for the damage to protected species and natural habitats, water, and soil. If, for example, an oil barge catches fire when passing through one of the Dutch canals, its operator will have to remedy the environmental damage caused by it, even if the incident has occurred without any fault on its part. However, when we look closer at the directive, we see that, in essence, it establishes a *public law* regime of *administrative* responsibility. Crucially, the directive requires *public authorities* to ensure that polluters limit or prevent further environmental damage and take remedial action. It also explicitly excludes the private parties' right to compensation for such damage. So if Martin's neighbourhood on the canal's bank is severely affected by the fire on the oil barge, he does not have a European remedy under the directive. It is also not surprising that this 'public law'-coloured EU measure has had very limited harmonizing effects on national tort law.

Payment Services Directive II vs. Markets in Financial Instruments Directive II

The EU legislation in the field of financial services – notably the Payment Services Directive II (PSD II)[17] and the Markets in Financial Instruments Directive II (MiFID II)[18] – affords the third remarkable illustration of the public/private dichotomy

[16] See, e.g., Case C-310/13 *Novo Nordisk Pharma GmbH v S* [2014] ECLI:EU:C:2014:2385 (the consumer's right to require the manufacturer of a medicinal product to provide him with information on the adverse effects of that product); Case C-621/15 *N.W., L.W., C.W. v Sanofi Pasteur MSD SNC, Caisse primaire d'assurance maladie des Hauts-de-Seine, Carpimko* [2017] ECLI:EU:C:2017:484 (evidentiary rules under which certain factual evidence can be considered to constitute evidence of a defect in the medicinal product and the causal link with the damage, even if there is no conclusive scientific evidence on this).

[17] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, *OJEU* 2015 L 337/35.

[18] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, *OJEU* 2014 L 173/349.

within EU private law. For the purposes of PSD II, the EU legislator has clearly chosen a combination of public and private law rules. The public law rules govern authorisation and supervision of payment service providers. To foster competition, for instance, they require banks to allow non-bank, typically 'fintech', companies to access banks' payments systems and client data bases. The PSD II's private law component in turn concerns the parties' rights and obligations in relation to payment services and is especially strong compared to many other EU measures. Importantly, PSD II even addresses the allocation of losses between the bank and its client in case of fraud, forgery and error. As a general rule, for example, Martin's bank will be liable for all losses that he has suffered in case of unauthorised transactions on his credit card.

In contrast, the major EU investor protection measure – MiFID II – was drafted from the manifestly *public law* perspective. It provides one of the best illustrations of the hybrid 'supervision private law' mentioned above. To enable administrative agencies to supervise securities markets, MiFID II includes an extensive set of conduct of business rules for investment firms, such as the firm's duty to act in the best interests of its client. These rules indirectly set standards of investment firms' behaviour in the private law relationship with their clients, as the term 'supervision *private* law' suggests. For instance, they do not allow a portfolio manager to invest Martin's money into the fossil fuel industry if he has clearly indicated that he wishes to support renewable energy companies. At the same time, because of the directive's almost exclusive focus on public supervision, the MiFID II conduct of business rules were implemented by the Member States within the financial supervisory frameworks. From a legal-technical point of view, therefore, these are *public law* rules concerned with the relationship between an investment firm and a *public authority* which can enforce them through *public law* means. In the absence of individual rights and remedies under MiFID II, it largely depends on national private law whether Martin will obtain compensation in case of the investment firm's breach of its formally public law duties. The key issue is whether such duties can have effect in national contract and tort law, and the approaches adopted by national civil courts tend to vary. As shown by the case law under the MiFID's II predecessor – MiFID I, Martin is much more likely to obtain relief under Dutch law, for example, than under English law. Importantly, the Court of Justice of the EU has not seized the opportunity to put an end to this controversy.[19]

As these three sets of examples demonstrate, a distinction reminiscent of the traditional public/private divide can be traced in EU private law. When pursuing similar policy goals, some EU harmonisation measures are clearly concerned with the balance between the private parties' rights and obligations or individual redress. In contrast, other such measures focus on the relationship between public authorities and private parties, and the role of public authorities in securing business compliance with harmonised rules. Overall, the more 'public' or 'private law' grammar of EU harmonisation measures is not the result of a systematic analysis of the relative merits of each

[19] Case C-604/11, *Genil v. Bankinter*, ECLI:EU:C:2013:344.

grammar option in terms of their appropriateness for achieving particular policy objectives. Rather, apart from the overall regulatory bias of the EU integration paradigm, the legal grammar of EU measures appears to be primarily dictated by two factors. First, it is path dependency of harmonisation in a given area (notably pre-existence of the national or EU legal framework of a particular type). Second, these are the political constraints surrounding the EU law-making process (notably resistance of the industry and/or Member States to the harmonisation of civil liability).

And yet, the legal grammar of a particular EU measure does matter in practice when it comes to the position of private parties like our Martin in case of breach of harmonised rules. Once a certain EU directive is adopted, the availability of individual rights and remedies in various legal systems will to an important degree be determined by the particular balance of public and private law elements that have emerged from the EU's legislative itinerary. Member States are clearly obliged to provide for individual rights and remedies within their national laws where a given EU measures is concerned, among other things, with interpersonal justice. However, they have much more room for manoeuvre where this is not the case. The differences between the 'public' and 'private law'-coloured EU measures may be reduced to some degree by the Court of Justice of the EU. But the Court's ability and willingness to 'insert' individual remedies into the public law-oriented measures is not self-evident. In the end, the choice for a 'public' or 'private law' grammar in a particular EU measure also matters in terms of speed and efficacy with which its policy goals are achieved.

IV. Outlook

I believe that the major lesson that can be drawn from this is that EU law should stop ignoring the existing differences between public and private law approaches. Instead, it should explicitly adopt the public/private language in its discourse. Rediscovering the public/private divide in this sense does not mean redrawing the strict line between public and private law. As we saw before, the dividing line between public and private law has indeed blurred. However, the rise of hybrid phenomena in the context of a post-nation state EU private law does not mean that we should get rid of the public/private dichotomy altogether as the irrelevant legacy of the nation-state. As Armin von Bogdandy remarked when exploring the idea of contemporary European *public* law, 'any observation of hybridity requires an understanding of the individual components that render something hybrid; a hybrid car is a car that uses combustion engine and an electric motor (…).[20] In my view, this is also true for European *private* law.

The EU's experimentation with the 'public' and 'private law' grammar options in the field of EU private law makes this area an interesting European laboratory. But in order to be able to experiment, one had better understand what one is actually experimenting with. Today Europe is facing unprecedented challenges which threaten its very existence and put under pressure the way of life that people like Martin are used to. Among them are climate change mitigation, a switch to a resource efficient circular economy, and the digitalisation of the marketplace and societies at large. EU Member States cannot cope with these challenges alone. Nor can the EU effectively address them without building a *stronger* connection with *national* legal systems. Beyond ideological battles, *both* public and private law concepts are hardly needed if we are to make any progress in addressing the grand challenges.

The acknowledgement of the public/private distinction for descriptive and analytical purposes should lead to more evidence-based law-making at the EU level – the law-making that would allow the EU legislator to assess the relative merits of each model (or a combination of the two) more accurately, and to ultimately choose the one most suited to pursue a particular policy goal. The EU's Better Regulation agenda[21] provides an opportunity to improve private law making along these lines. In my understanding, better regulation in the field of private law does not mean 'more Europe' in the sense of more or full harmonization of private law, let alone the introduction of a European Civil Code. Rather, it implies the need to critically assess where we stand now in terms of the effectiveness of EU private law and the role of interpersonal justice therein, and what can be done better at the EU and national level.

But policy-makers cannot do it alone. The legal framework for private law relationships in the areas harmonised by the EU increasingly looks like Cildo

---

[20] A. von Bogdandy, 'The Idea of European Public Law Today', in A. von Bogdandy, P.M. Huber & S. Cassese (eds), *The Max Planck Handbooks in European Public Law. Vol. I: The Administrative State* (Oxford University Press, 2017) 1, at 13.

[21] European Commission, *Better Regulation Guidelines*, SWD(2017) 350.

Meirels' sculpture 'Babel 2001' on display at London's Tate Modern. Comprising hundreds of radios, each fine tuned to a different station, the sculpture relates to the biblical story of the Tower of Babel. It addresses the ideas of information overload and failed communication in modern times, and these are very true for EU private law. What is needed today is a common theoretical framework that would facilitate a meaningful dialogue between public and private lawyers involved in the making and implementation of EU private law. A dialogue that would lead to a better understanding of the role of private law in constituting and regulating markets in the public interest and the interplay between public and private law in this context. And it is here that the legal scholarship should take the lead. But to do so, we should dare to think out of the box and cross the disciplinary, departmental, and faculty boundaries, while at the same time acknowledging the specificities of public and private law, and the law and other disciplines. This is what I seek to promote through teaching and research as a Chair in European Private Law and Comparative Law within the research programmes 'Public Interests and Private Relationships' and 'Public Trust and Public Law', and within the Groningen Centre for European Financial Services Law. The ultimate goal is to bring us a bit closer to finding the right balance between public and private interests in our turbulent times, and this is what it is all about.

Cildo Meirels – *Babel 2001*

V. A words of thanks

Let me conclude with a brief word of thanks. I am grateful to the boards of the University of Groningen, the Faculty of Law and the Department of Administrative Law and Public Administration for their trust in me and support, to my Ph D supervisor Willem Grosheide for believing in me from the very outset, to the former and present colleagues from the Universities of Utrecht, VU Amsterdam and Groningen for pleasant and fruitful cooperation, to the colleagues from other universities in the Netherlands and abroad (Canada, Germany, Italy, Norway, UK, to name but a few) for continuously inspiring me, and to my family and friends for their love and unconditional support. I am so honoured that many of you are present here today. It means a lot to me.

Ik heb gezegd.